No. 15,151

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 12,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

STATEMENT AND ARGUMENT.

I.

Upon the Record Considered as a Whole There Is No Substantial Evidence Sufficient to Sustain the Exercise of the Board's Jurisdiction and the Complaint Must Be Dismissed.

A.

The Crook Company.

Crook Company, a corporation, is engaged in the business of selling and servicing construction equipment at retail, in Los Angeles, California, and performs much of its servicing work on equipment located at construction projects some of which are a considerable distance from Crook's Los Angeles locations. [R. 113.]

Michael Bessich, General Manager of Crook, testified that he "overlooks" the operations of the company, works hand in hand with the heads of the various departments, and that these departments are under his "supervision."

Upon only this foundation and over proper and timely objections of respondent Bessich gave uncorroborated hearsay testimony to the effect that 90% to 95% of the equipment handled by Crook came from without the State of California and that Crook sells outside of California "quite a bit in excess of $50,000. annually" and upon prodding by the General Counsel further stated that the exports were in excess of $100,000 per year.

All of this hearsay testimony was given with reference to books and records of the company. In fact Bessich testified that he had not consulted any documents from which he was testifying. No documents were presented at the hearing and no opportunity to consult any such documents was proffered to respondent. There is nothing in Mr. Bessich's testimony to indicate that any of his statements were or could be supported by documents, records, books of account or other such media. Throughout his testimony, the record shows, Bessich was giving only his conclusions which were not corroborated in any way with factual material. [R. 114, 115.]

B.

The Shepherd Machinery Company.

Shepherd Machinery Company (herein called Shepherd) is a partnership, according to General Counsel's witness, Montgomery, who stated he was the Assistant General Manager. [R. 120.] Over proper and timely objections of respondent Montgomery was permitted to testify that Shepherd's "equipment" came from the mid-west—the

annual volume received from a manufacturer in Peoria, Illinois, was "over a million dollars" annually. He further stated that Shepherd's sales outside of California exceeded $100,000 on an annual basis. He said that Shepherd was engaged in a business of selling and servicing construction and farming equipment in Los Angeles, California. [R. 121-123.] Mr. Montgomery did not testify from any memorandum, books, records or documents of Shepherd nor were any books, records or other documents of the company, which may have supported these various statements, presented at the hearing for inspection of respondent, and no proffer was made to make such documents available to respondent for inspection and for the purpose of cross-examination.

There can be no reasonable doubt that the testimony of these two witnesses was of the clearest hearsay. It is also quite apparent that no attempts at corroboration of this hearsay were made. The companies' records were not in court, no memorandum of their contents was prepared or presented for the record and the testimonies do not even purport to be oral reflections of any records or documents. There was no showing that the records of these companies were unavailable or were of such a nature as to make them impractical of production at the hearing. No attempt is made to excuse corroboration on the basis of inconvenience nor is there any other showing to warrant the departure from the well established rules of evidence on the grounds of impracticability.

Section 10(b) of the Act, reads in part as follows:

"* * * Any such proceeding shall, *so far as practicable,* be conducted in accordance with the rules of evidence applicable in the District Courts of the United States, adopted by the Supreme Court of the United States

pursuant to the Act of June 19, 1943." (Emphasis supplied.) The words "so far as practicable" were not inserted into this Act as an idle gesture by the Congress. Congress had heard from litigants before the Board of many instances where uncorroborated hearsay was accepted and made the basis of findings of the Board. Congress had before it the condemnation of this practice set forth in decisions of the Supreme Court, which were made under the Wagner Act that did not require the rule of evidence to be controlling. Particularly did the Supreme Court speak upon the use of uncorroborated hearsay, in *Consolidated Edison Company v. NLRB,* 305 U. S. 197 stating that hearsay uncorroborated was not substantial evidence sufficient to support findings of the Board. Congress's review of the history of the effect and application of the Wagner Act and unequivocally concluded that a change in evidentiary procedure was required so that litigants before the Board would be afforded reasonable safeguards against past abuses and not to expose them to mere whims and caprices of an administrative proceeding which could operate without limitations in the reception of evidence of the hearsay type and the basing of findings and conclusions bottomed upon such hearsay evidence standing alone.

The legislative history of the Taft-Hartley amendments show that the insertion of the words "so far as practicable" were not intended to permit a return to the practices prevalent and while there was a recognition that flexibility under certain circumstances may be necessary, the added flexibility is not without limitation. "So far as practicable" means there must be some sound basis in reason why it would be impracticable to follow the rules of evidence. The statute leaves no room for arbitrary con-

clusions as to what is and what is not practical. We submit that the Trial Examiner in finding this hearsay; sufficient to support a finding of jurisdiction is completely at war with the attempt of Congress to remedy existing abuses of the use of hearsay.

Both of these companies have their headquarters within the City of Los Angeles. The lack of any attempt to show that their records were voluminous, bulky or that they were constantly required for the operations of these businesses point forcibly to the availability and the practicability of producing them for inspection and verification upon this most important subject. Had there been proof of this, the Board has provided a method which excuses the production of such records by the preparation of memoranda in lieu thereof, provided that due safeguards of checking and inspection are preserved.

We have here neither written nor oral summaries which purport to be of any pertinent records of these companies. We have merely unsupported conclusions and opinions of biased witnesses.

Since the passage of the Taft-Hartley amendments, the United States Court of Appeals for the Ninth Circuit has had occasion to re-examine the doctrine expressed in *Consolidated Edison* and has reaffirmed the Supreme Court's pronouncement that uncorroborated hearsay does not amount to substantial evidence sufficient to sustain a finding of the Board, especially upon such an important decision as the exercise of the Board's jurisdiction. In *NLRB v. Haddock Engineers, Ltd.,* 215 F. 2d 734, the Ninth Circuit declined to enforce a Board Order because its findings of effect upon interstate commerce was only supported by hearsay evidence uncorroborated. In doing so that Court expressly followed the doctrine of *Consoli-*

to finish his chores and whether the trounapull he was working on had not come through respondent's picket line at the Crook Company. Neuenschwander admitted that it had but stated that he would be finished with his work in a short period of time. The Trial Examiner found that Mussro then said to Neuenschwander that he had better leave but almost immediately withdrew the suggestion by saying in a loud voice, "*probably audible* to the Crowell and Larson employees who were standing nearby, 'Well, you can go ahead and work, but we are not going to work.' " (Emphasis supplied.)

Witnesses Smedley and Dias, called by the General Counsel testified about the arrival of Mussro, who upon arrival asked Smedley and Dias if they knew there was a picket line at Crook Company [R. 80, 81, 82, 83, 84], and then went over to Neuenschwander and asked if he had come through a picket line. Smedley said that the Crowell and Larson employees followed Mussro to where Neuenschwander was working; that when Mussro asked him how long it would take to complete the work Neuenschwander replied, 5 or 10 minutes, Mussro told the man to take his time and he would pull the men off the job. [R. 81.] All agreed that Neuenschwander continued to work without further interruption and without any of the personnel or Mussro having further conversation with him.

Dias admittedly was the foreman on the job and had power and authority to require the men to resume their work, but that he did not do so. [R. 96.]

There is no evidence that Mussro gave any direct instructions to the men to cease work or not to resume work. The only possible source of a supposition that Mussro "pulled" the men off the job must come from the conversa-

tion between Mussro and Neuenschwander. The Trial Examiner did not make a finding that the employees heard this conversation, he disposed of this phase by stating that the conversation was *"probably audible"* to the employees. The evidence shows these employees were 18 to 20 feet away at the time of and during the conversation.

After the conversation Mussro and the employees returned to where the lunches were being eaten and a spirited discussion with and question of Mussro was begun by those employees who were seeking to be enlightened on the various points of controversy with the Crook Company. No one testified that during this episode Mussro gave any instructions not to work or not to resume work. Undisputedly, Mussro performed the functions of his job by listening to "beefs", checking dues cards and Union standing of the men. It is uncontradicted that his routine check was prolonged by lengthy questions concerning matters foreign to the instant matter. [R. 132-135.]

Smedley and Dias also testified about new equipment on this job, and that Mussro asked where it came from, saying that he would take the serial numbers and if he found that the equipment came through a picket line he would come back and shut the job down. However, both Smedley and Dias testified that none of the employees had ever refused to work on this equipment or any other equipment and at the time of the hearing Smedley was still operating the machine which Neuenschwander repaired. [R. 85, 96.]

When viewed unemotionally, this incident at best is merely a sporadic momentary failure to return to work. Whether this result flowed from the failure of the equipment to arrive at noon that day, which the employees were

waiting for or whether it stemmed from other sources is not found by the Trial Examiner. It is true that he found that Mussro stated that the men would not work as long as Neuenschwander was on the job and that Mussro stated that he would take serial numbers, investigate, and if certain facts were present he would come back and shut down the job. But the Trial Examiner did not find that these statements caused or compelled the failure to return to work, if there was one. The Trial Examiner did not find that these statements, even if made, were acts of inducement or encouragement or were otherwise violative of the Act. The failure to make such findings may have resulted from the Trial Examiner's uncertainty which he revealed when he stated that Mussro's statements to Neuenschwander were "probably" within the hearing of the Crowell and Larson employees. It may be that he disregarded the undisputed testimony that Mussro's time, while on the job, was occupied by the fulfilling of his ordinary functions. In any event, the Trial Examiner had made no findings that these acts of Mussro caused or attempted to cause the employees to fail to return to work.[1] The absence of such findings and the further absence of any exceptions to the failure to make those findings is binding on the Board and must be accepted by the Board, as the statute requires.

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[1]Crowell's Foreman Dias, who was in charge of the job, made no effort to get the men to return to work. In fact, he combined to effect the failure to return to work. The plain facts are that as to three of these employees it was not possible for them to return to work before the time they did so. Smedley could not work because his equipment was being repaired, the water wagon driver had not had his lunch period and Ullibarri could not get his equipment going until after the arrival of the needed equipment. The four remaining employees had questions of personal natures and discussed them with Mussro.

The Trial Examiner and the Board, concurring, found, generally, "By inducing and encouraging employees of Crowell and Larson . . ." respondent has violated 8(b)(4)(A). But this conclusion is meaningless because it is not founded on any factual finding that Mussro's activity and conduct violated the Act in any particular. This the Board must accept. (Section 10(c) NLRB; Administrative Procedure Act, Sections 7 and 8.) *International Brotherhood of Electrical Workers v. NLRB,* 181 F. 2d 34; *Rabouin d/b/a Conway Express Co.,* 87 NLRB #130; review denied 195 F. 2d 906; *Arkansas Express Co.,* 92 NLRB 255; *Ferro Corp.,* 100 NLRB 1660; *Crowley Milk Co.,* 104 NLRB 102.

B.

Incident in Which Shepherd Machinery Company Was Involved.

1. The McCammon-Wunderlich Incident.

McCammon-Wunderlich Company, on May 23, 1955, was engaged in an earth moving construction job in a suburb of Los Angeles, California. At 4:00 A.M. that morning several of its employees, operators of the equipment, met before beginning their day's work and discussed the question of non-union men coming onto such jobs and doing the work which came under the jurisdiction and contracts of respondent with employer, including McCammon-Wunderlich. They decided that the next time a non-union workman came onto the job for the purpose mentioned they would "more or less go and get a drink of water until they (the non-union men) left." [R. 142, 143, 144, 145, 146.] Only employees were present at this meeting. The *Job Steward was not.*

Later that morning a truck from Shepherd came on the job in plain view of most of the employees and stopped on the top of the dam site that was being constructed. Upon its arrival each of the several operators-employees began to relay to each other by signal the fact that a non-union man had come on the job, and pursuant to their previous decision each of the operators-employees ceased their work, and so remained until the non-union employee left the site some 20 or 30 minutes later. [R. 146.]

From the undisputed evidence it appears that most, if not all, of the operators engaged in passing the signals and participated in the work stoppage. [R. 145, 146.]

Clint Waggner, the Job Superintendent for McCammon-Wunderlich, was informed of the stoppage. He immediately ordered the Shepherd men to leave the premises. [R. 66.] Then he called Red Hunter, the Job Steward, and told him about sending the Shepherd men away and requested Hunter to ask the men to return to work, which was done. [R. 67.] Waggner next called the office of respondent and talked to a Mr. Seymour who stated he did not know of any work stoppage and did not understand what had happened. [R. 67.] The record does not reveal what position, if any, Seymour had with respondent or that Seymour was even in the employ of respondent. The Trial Examiner found that Seymour was a "representative of the respondent" but the record only shows that Waggner called the office of respondent and asked for Seymour with whom he had talked a number of times—about what the record is silent. According to Waggner, Seymour said there was a picket line at Shepherd's and that "we (McCammon-Wunderlich) could not have Shepherd people on the job . . ." [R. 68.] We submit that, upon this evidence, a finding of agency binding on re-

spondent is unwarranted and unjustified. From all that appears, Seymour was not established to be an agent of the Respondent Union.

During the process of signaling, Red Hunter, a Shop Steward of respondent, according to the testimony of James Green, a Foreman, was found talking to a crane operator who was employed by a concern other than McCammon-Wunderlich, and upon inquiry by Green the crane operator told Green that Hunter had instructed him to drop his load and swing out the crane's boom or he would be fined $100. The operator, upon Green's instruction, dropped his load and did as Green had instructed him to do. [R. 61, 62, 63.] Hunter then departed giving the signal to other employees to cease work.

The evidence fairly viewed shows that the stoppage of work was a voluntary action on the part of the employees, taken without instructions or directions from respondent, and, in fact, without even the knowledge of respondent or its agents. The proscription of 8(b)(4) do not reach voluntary and spontaneous acts of employees unless those actions are the result of orders or directions of a labor union. The Trial Examiner did not discredit this undisputed evidence and did not find that the actions of these employees constitute a violation. His findings rest solely upon Hunter's "direction" to the crane operator and his participation in giving signals, and Seymour's statement to Waggner that the "purpose of the respondent [was] to prevent McCammon from doing business with Shepherd."

As we have shown, Seymour was not proved to be an agent of respondent. Whatever he may have said does not bind the Union. The fact that Hunter participated in giving signals does not convert this otherwise voluntary

employee action into an action of respondent. After all Hunter was an employee too. Hunter's action at the crane stemmed from the question put to him by Green, the employer's supervisor, and in giving his answer Hunter was not committing any violation for which respondent was responsible. *NLRB v. Rice Milling Co.,* 341 U. S. 665. Green, the Foreman, was the one that directed the crane operator to cease his work and immediately acquiesced in the position Hunter had stated. Under these circumstances it has been repeatedly held that no violation has been committed. *Arkansas Express Co.,* 92 NLRB 255; *Ferro Corp.,* 100 NLRB 1660.

Even though a finding of a technical violation might be made, which we do not concede, standing alone as it now does, it is not sufficient to warrant a finding of a violation of 8(b)(4). *Santa Ana Lbr. Co.,* 87 NLRB 937.

III.

There Has Been No Violation of 8(b)(4)(B).

We have shown above that there have been no violations of Section 8(b)(4). However, since the complaint alleges a violation of 8(b)(4)(B) we do not rely solely upon the above showing but point to the evidence that respondent makes no claim for recognition from either the Crook or Shepherd companies. The picket line at Crook was maintained because Crook has dealt unfairly with members of respondent union and the Shepherd Company is in open competition with respondent as to who will do the repair work on construction sites. [R. 148, 149, 150.] The record shows that Shepherd filed a petition for certification but withdrew it upon respondent's disclaimer of representative capacity. Respondent also has disclaimed any interest in recognition as the exclusive bargaining agent of the Crook employees.

IV.
Conclusion.

When we face the full impact of the Board's case, this is what we have: A Union business agent, Mussro, in going about his customary duties of ascertaining whether the men on the job are union members takes about an hour in doing so and in discussing their problems and grievances. The Board says that true enough Mussro had the right to be on the premises and check the membership cards etc., but he should not have said to the Crook Company employee that the men would not work as long as he was there. It was the lunch hour and they did not work for about an hour but, thereafter, proceeded about the work. To punish a labor organization because one of its employees may be loose in his language is to overlook the realities involved. Mussro never intended to violate the law or to damage the Union by his few brief words.

The other episode complained of has equal importance. In the McCammon-Wunderlich matter, the company superintendent himself did not want the disturbing factor of the Shepherd Company men on the premises and his staunch Union employees had banded themselves together, without Union coercion or persuasion, to assert their lawful right to work with whomever they chose. They might have been fired for this but it was not a violation of the Act.

We believe this powerful arm of the Government should not be used except upon a clear showing of purposeful violation of the Act. This Honorable Court has said that to predicate a cease and desist order upon such occurrences is to magnify the inconsequential. (See Title 5, U. S. C. A., Sec. 1009(e); *N.L.R.B. v. Meatcutters Local,* 202 F. 2d 671.)

We urge, therefore, that the Board's order be denied enforcement, because of lack of proof on the merits and with respect to the Board's jurisdiction.

Respectfully submitted,

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